IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,	:	CIVIL ACTION
and	:	
MANESSTA BEVERLY, Intervenor,	:	
v.	:	
HORA, INC. (d/b/a "Days Inn") and MARSHALL MANAGEMENT, INC., Defendants.	:	NO. 03-cv-1429

M E M O R A N D U M and O R D E R

July 22, 2005

PRATTER, DISTRICT JUDGE

I. INTRODUCTION

On June 8, 2005, this Court entered a Memorandum and Order disqualifying Jana R. Barnett, Esq., from further representing Intervenor Manessta Beverly. (Docket No. 59). Within the accompanying Memorandum to the Order, the Court discussed at length the factual background and legal standards on which the Court based its decision to disqualify Ms. Barnett. Thereafter, on June 23, 2005, Ms. Barnett filed a Motion for Certificate of Appealability (the "Barnett Motion") with regard to the Court's disqualification Order. (Docket No. 60). Thereafter, the Equal Employment Opportunity Commission ("EEOC") filed a Response to the Barnett Motion. (Docket No. 61). Defendants HORA, Inc. and Marshall Management, Inc. filed

a Joint Response in Opposition to the Barnett Motion (the "Joint Response"). (Docket No. 62). For the reasons stated more fully below, the Barnett Motion is denied.

II. STANDARD OF REVIEW

A district court may, in its discretion, certify an otherwise unappealable interlocutory order if the court is "of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation . . ." 28 U.S.C. §1292(b); see also, Coopers & Lybrand v. Livesay, 437 U.S. 463, 475 (1978). Orders granting and denying motions to disqualify attorneys are not final decisions, and do not fall within the collateral order exception to the final judgment rule. Richardson-Merrell, Inc. v. Koller, 472 U.S. 424, 426 (1985) (orders disqualifying counsel in a civil case are not collateral orders subject to immediate appeal); Flanagan v. United States, 465 U.S. 259, 260 (1984) (a district court's pretrial disqualification of criminal defense counsel is not immediately appealable under §1291); Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 370 (1981) (orders denying motions to disqualify counsel are not appealable final decisions under §1291). Certification, as sought by Ms. Barnett, is not routinely granted, being reserved for exceptional cases. See Caterpillar, Inc. v. Lewis, 519 U.S. 61, 74 (1996); Coopers & Lybrand, supra (stating "exceptional circumstances" must exist).

Furthermore, in order for an otherwise unappealable interlocutory order to qualify for certification, a district court must state in writing:

(1) That the order in question involves a "controlling question of the law";

> (2) That a "substantial ground for difference of opinion" exists on the legal issue the order resolves; and
> (3) An immediate appeal from the interlocutory order may "materially advance" the ultimate termination of the litigation.

28 U.S.C. §1292(b). The moving party must satisfy all of these criteria. See Ahrenholz v. Board of Trustees of University of Ill., 219 F.3d 674, 676 (7th Cir. 2000).

III. DISCUSSION

In her Motion, Ms. Barnett argues that the Court acknowledged in its prior Memorandum and Order, dated June 8, 2005 (hereinafter, "Opinion" or "Op. at __"), that the decision to disqualify her "involves a controlling question of law as to which there is substantial ground for difference of opinion." See Barnett Motion at 4. Ms. Barnett misreads or misinterprets the gravamen of the Court's discussion. In fact, the Opinion stated:

> Giving Ms. Barnett the benefit of the doubt, many of the professional conduct issues in the instant matter may be considered *by some practitioners* to be unsettled.

Op. at 33 (emphasis added). Nevertheless, the Court also stated:

> with regard to any doubts as to the existence of a violation of the rules, it is prudent to resolve those doubts *in favor of* disqualification.

Op. at 34 (emphasis added). The Court did not find then, and does not now find, that a controlling question of law exists with regard to the issues surrounding Ms. Barnett's disqualification. Certainly, of course, the issues relating to disqualification do not involve a controlling question of law concerning the subject matter of the actual case.

The Court of Appeals for the Third Circuit has said that it is within the sound discretion of the district court to disqualify a lawyer for failing to avoid even the appearance of impropriety:

> The maintenance of public confidence in the propriety of the conduct of those associated with the administration of justice is so important a consideration that **we have held that a court may disqualify an attorney for failing to avoid *even the appearance of* impropriety**. Kramer v. Scientific Control Corp., 534 F.2d 1085, 1088-1089 (3d Cir. 1976); Richardson v. Hamilton International Corp., 469 F.2d 1382, 1385-1386 & n.12 (3d Cir. 1972), cert. denied, 411 U.S. 986, 93 S.Ct. 2271, 36 L.Ed.2d 964 (1973). See also, Cinema 5, Ltd. v. Cinerama, Inc., 528 F.2d 1384, 1387 (2d Cir. 1976). Indeed, the courts have gone so far as to suggest that **doubts as to the existence of an asserted conflict of interest *should be resolved in favor of* disqualification**. Hull v. Celanese Corp., 513 F.2d 568, 571 (2d Cir. 1975); Chugach Elec. Ass'n v. United States D.C. for Dist. of Alaska, 370 F.2d 441, 444 (9th Cir.), cert. denied, 389 U.S. 820, 88 S.Ct. 40, 19 L.Ed.2d 71 (1967).

Int'l Bus. Mach. Corp. v. Levin, 579 F.2d 271, 283 (3d Cir. 1978) (emphasis added). This guidance from the court of appeals was cited in the Court's Opinion at issue. The Court of Appeals for the Third Circuit has also advised that a district court

> should disqualify an attorney only when it determines, on the facts of the particular case, that disqualification is an appropriate means of enforcing the applicable disciplinary rule. It should consider the ends that the disciplinary rule is designed to serve and any countervailing policies, such as permitting a litigant to retain the counsel of his choice and enabling attorneys to practice without excessive restrictions.

United States v. Miller, 624 F.2d 1198, 1201 (3d Cir.1980), citing United States *ex rel.* Sheldon Electric Co. v. Blackhawk Heating & Plumbing Co., 423 F.Supp. 486 (S.D.N.Y. 1976); Baglini v. Pullman, Inc., 412 F.Supp. 1060 (E.D.Pa. 1976), affirmed, 547 F.2d 1158 (3d Cir. 1977).

A review of the prior Opinion, *in toto*, reveals that the Court did not take lightly the task at hand, inasmuch as the Court considered all the proffered facts and oral testimony submitted by the parties, the ends that the applicable disciplinary rules are designed to serve, and other countervailing policies that weigh against disqualification. After considerable reflection and balancing of these factors, however, in the end, applying our court of appeals' guidance to the

disquieting facts of the instant matter, the Court disqualified Ms. Barnett. In summary, the Court found not only the appearance, but also the existence, of improper professional behavior by Ms. Barnett.

Ms. Barnett's arguments in support of her Motion do not meet the 1292(b) criteria. As stated above, the question of Ms. Barnett's disqualification does not involve a "controlling question of law." A "controlling question of law" under §1292(b) involves a question of "pure law" that an appellate court can resolve "quickly and cleanly" without laboring over the record. See McFarlin v. Conseco Servs., LLC, 381 F.3d 1251, 1259 (11th Cir. 2004). In the instant matter, the question of law at issue is the Court's application of the Pennsylvania Rules of Professional Conduct to Ms. Barnett's conduct. Ms. Barnett's conduct is neither "controlling" nor material to the state and federal claims alleged by Plaintiff EEOC and Intervenor Plaintiff. Rather, Ms. Barnett's stated reason for seeking an interlocutory appeal is to rehabilitate her professional reputation. Such purpose or reason does not qualify as a controlling question of law with regard to the resolution of the parties' allegations and defenses.

Moreover, a "substantial ground for difference of opinion" does not exist on the legal issues resolved by the Opinion. Ms. Barnett failed to cite to and the Court has failed to discover any conflicting legal authority with regard to a district court's discretionary disqualification of an attorney for, at a minimum, the appearance of ethical violations such as emanating from the conduct at issue here. See Int'l Bus. Mach., 579 F.2d at 283; Miller, 624 F.2d at 1201. Thus, the law is well-settled, pursuant to our court of appeals, that a district court may, in its discretion, sanction attorneys appearing before it for violations of applicable ethical rules up to, and including, disqualification from the litigation. Id.

Despite Ms. Barnett's statements to the contrary, an immediate appeal from this Court's Disqualification Order does not qualify as an issue that may materially advance the ultimate termination of the litigation. See Barnett Motion at 4. Ms. Barnett's disqualification is not at issue in the instant matter -- its resolution is not central to resolving the allegations contained within either the Plaintiff's or Intervenor's respective complaints. Rather, the issues at hand are the allegations brought by the EEOC as Plaintiff and Ms. Manessta Beverly as Intervenor.

Finally, both counsel for the EEOC and Defendants take issue with one of Ms. Barnett's central allegations that "[t]he EEOC informed [Ms. Barnett] that defense counsel initiated settlement discussions with the EEOC the week following the entry of the June 9, 2005 Order [without] notify[ing] Ms. Barnett of the impending settlement discussion." See Barnett Motion at 4. Affidavits filed by counsel for both Plaintiff EEOC and Defendants HORA, Inc. and Marshall Management leave no doubt that those counsel agreed to discuss the settlement of the EEOC claims (but not the Intervenor claims) at some point *after* the Court determined whether Ms. Barnett would be permitted to remain as Intervenor's counsel. See Affidavit of Dawn Edge (EEOC) (Pl. Ex. A to the EEOC Response) and Affidavit of Andrew Howe (HORA) (Def. Ex. A to Defendant's Joint Response). Therefore, based on a full review of the representations provided by the EEOC and Defendants, the Court does not share Ms. Barnett's concern that "[d]efense counsel's rush to initiate settlement discussions is consistent with Mrs. Beverly's perception that the motion to disqualify was a tactic to pressure her to settle the case."[1] See Barnett Motion at 5 f.2. It appears that Ms. Barnett neglected to verify or otherwise confirm with

[1] Nonetheless, by June 14, 2005, the day EEOC and Defendants actually discussed scheduling a conference call with regard to reinitiating settlement discussions, Ms. Barnett had been disqualified. See Edge Affidavit, ¶9; Howe Affidavit, ¶17.

the persons who would know the facts whether there was factual basis for her allegations on which she bases, in part, her Motion.

IV. CONCLUSION

Therefore, for the reasons stated above, Attorney Jana R. Barnett's Motion for Certificate of Appealability is denied.

BY THE COURT:

/S/_____
GENE E.K. PRATTER
UNITED STATES DISTRICT JUDGE

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O R D E R

July 22, 2005

PRATTER, DISTRICT JUDGE

AND NOW, this 22nd day of July, 2005, upon consideration of the Memorandum and Order, dated June 8, 2005, disqualifying Jana R. Barnett, Esq., from further representing Intervenor Manessta Beverly (Docket No. 59), Barnett's Motion for Certificate of Appealability (the "Barnett Motion") (Docket No. 60), the Equal Employment Opportunity Commission's Response to the Barnett Motion (Docket No. 61), and Defendants HORA, Inc. and Marshall Management, Inc.'s Joint Response in Opposition to the Barnett Motion (Docket No. 62), IT IS ORDERED that the Barnett Motion is DENIED.

BY THE COURT:

/S/_____
GENE E.K. PRATTER
UNITED STATES DISTRICT JUDGE